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In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD E. LYNG, SECRETARY OF AGRICULTURE, AND THE DEPARTMENT OF AGRICULTURE, PETITIONERS

v.

STATE OF IOWA, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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Respondents pay scant attention to the statutory language that plainly authorizes—but does not require—the Secretary to act in the circumstances of this case. Nor can respondents overcome the absence of law to apply to enable a court to review the Secretary's decision not to implement the discretionary SDPP in this instance. Rather, respondents' submission serves to underscore the need for this Court to review the Eighth Circuit's transformation of the Secretary's discretionary authority into a mandatory benefits program.

1. The decision below remanded the case to the district court to "consider [respondents'] requests for preliminary and permanent injunctive relief compelling the Secretary to implement the SDPP" (Pet. App. 16a-17a). On remand, the

district court required the Secretary to promulgate final regulations. In order to avoid the confusion that would be generated by regulations "implementing" a program under a decision this Court might reverse, we sought a stay of proceedings pending disposition of the petition for a writ of certiorari. After initially entering a temporary stay, Justice Blackmun denied our application on May 16, 1986. In order to comply with the district court's order, the Secretary published proposed regulations on May 20, 1986 (51 Fed. Reg. 18552). The State of Iowa, a respondent in this case, filed what it describes as "a lengthy Comment * * * attacking the Proposed Rule" (Br. in Opp. 13).[1] It is now apparent that unless this Court halts the administrative process set in motion by the decision below, pointless and protracted litigation will ensue challenging the validity of regulations the Secretary need never have issued. Further litigation inevitably will arise each time the Secretary decides whether to implement his discretionary authority in a given emergency. There is scarcely any basis to suppose that Congress chose to have the Secretary's discretionary response to emergency disaster situations restricted by a bureaucratic straitjacket and subject to judicial hindsight, as here, years after the event.[2] The statute makes it plain that Congress intended nothing of the sort. In place of the flexibility and efficiency with which Congress intended the Secretary to respond to emergencies, the decision below has planted the seed of administrative encumbrance. This Court should grant review to uproot that seed before it germinates.

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[1]Pursuant to the district court order, the Secretary issued final regulations effective June 9, 1986 (51 Fed. Reg. 21326).

[2]This case involves the SDPP provision for feed grain producers only, but the statutory language is identical to other provisions relating to producers of rice, wheat, and upland cotton (see Pet. 2 n.1). Thus, if the decision below is permitted to stand, it is predictable that similar challenges will be generated under the companion provisions for other crops.

2. Respondents are incorrect in stating (Br. in Opp. 20-21) that the decision below follows established law. As we have explained (Pet. 18-19), the decision flies in the face of this Court's repeated instruction that courts may not step in to supply criteria for agency action where Congress has omitted to do so in its grant of discretionary authority. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 & nn. 11-14 (1984); *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984); *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985). Moreover, the decision below deprives Congress of the important power to delegate discretionary authority based on conditions precedent without having a court intrude its judgment into the process to create a mandatory program whenever it believes the conditions are met. Review is therefore warranted to protect this important legislative option.

3. Respondents assert (Br. in Opp. 15-16 (emphasis added)) that in authorizing the discretionary SDPP, Congress "*expected* the Secretary to provide disaster payments [under 7 U.S.C. 1444d(b)(2)(D)] when he found" that certain enumerated conditions exist, *i.e.*, (1) that there is an economic emergency due to production losses caused by natural disaster, (2) that federal crop insurance payments and other federal assistance are " 'insufficient to alleviate such economic emergency, or no crop insurance covered the loss because of transitional problems attendant to the federal crop insurance program; and' " (3) that " 'additional assistance must be made available * * * to alleviate the economic emergency.' " That Congress had no such "expectation" is reflected in the plain language of the statute, which expressly states that the Secretary "*may*" provide such payments *on the condition that* such factors are found to exist. As our petition (at 12-14, 17) explains, neither the language nor structure of Section 1444d(b)(2)(D) *requires*

the Secretary to take the permitted action.[3] Indeed, Congress expressly abolished the *mandatory* SDPP where federal crop insurance is available (see 7 U.S.C. 1444d(b)(2)(A)-(C)), and couched the authority granted under Subsection (D) in terms of the unqualified permissive "may." The court of appeals has read this distinction out of the Act, and has undone Congress's careful design to provide a limited, *discretionary* power to be exercised in accordance with the Secretary's judgment so as not to undermine the crop insurance program and Congress's overall plan to reduce direct federal financial involvement in the agricultural industry. The decision below effectively eliminates Congress's option to set threshold conditions to trigger discretionary authority without converting the conditions into an automatic mandate for action. Cf. *Young* v. *Community Nutrition Institute,* No. 85-664 (June 17, 1986).

4. Respondents incorrectly assert (Br. in Opp. 16-18) that Senator Heflin's remarks provide controlling legislative history. As we have explained (Pet. 17 nn. 16 & 17), Senator Heflin addressed only one narrow aspect of the discretionary SDPP, *i.e.,* the authority to grant assistance where the inadequacy of crop insurance was due to "transitional problems attendant to the Federal crop insurance program" (7 U.S.C. 1444d(b)(2)(D)(ii)). Senator Heflin's examples of transitional situations in which the use of disaster payments "would be equitable to producers" (S. Rep. 97-126, 97th Cong., 1st Sess. 78 (1981)) do not suggest a mandatory requirement, nor were they codified in the statute. Clearly, then, those remarks do not offer a court any "law" to apply.[4]

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[3]The three statutory findings are conditions that must be met before the Secretary may even consider using his discretion under the Act.

[4]In any event, respondents do not contend that Senator Heflin described the situation in this case as one in which discretionary payments would be appropriate.

5. The "administrative materials" relied on by respondents (Br. in Opp. 18-20) also provide no guidance to a court considering the Secretary's action in this case. The cited materials all postdated the relevant legislation and do not address the question in this case: the Secretary's decision whether to implement his discretionary authority in a given emergency. Rather, the materials upon which respondents rely refer to questions that arise in administering the program after the Secretary's decision to implement has been made. Thus, respondents cite a GAO report written more than one year after the Agriculture and Food Act of 1981 was enacted. That report focused on the situation that obtained when the Secretary chose to implement the program of discretionary SDPP payments for certain counties in Texas, Oklahoma and New Mexico in 1982; it criticized the *administration* of the program in that instance. GAO, *Report to the Honorable Berkley Bedell, House of Representatives: USDA Needs Objective Criteria for Awarding Special Disaster Payments* (Nov. 2, 1982) [hereinafter cited as GAO report].[5] As the dissent in the court of appeals pointed out (Pet. App. 21a), the GAO report "has no binding effect on the Secretary" and "specifically assumes that the Secretary has decided to implement the program in a particular situation and only suggests that the Secretary adopt uniform criteria in determining what specific areas will be eligible to receive payments." The report does not address the issue presented here, much less provide "law" for a reviewing court to apply. Moreover, the GAO report (at 15) recognizes that "[t]he Agriculture and Food Act of 1981 provides USDA with discretionary authority to award

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[5]The GAO report (at 2) (emphasis added)) states that "USDA *used* its discretionary authority to award disaster payments in an inconsistent manner" by designating certain counties for payments when more seriously affected nearby counties were not designated, based on " 'subjective' " determinations of the severity of damage (*id.* at 9). See also *id.* at 10.

special disaster payments," and finds (*id.* at 16) "indications [that] suggest that disaster payments discourage [federal crop insurance] participation." Therefore, while it does not discuss the factors that might guide an implementation decision, the GAO report implicitly supports the Secretary's position that Congress intended to commit that decision to the Secretary's sole discretion.

Respondents also cite (Br. in Opp. 19) the "Report of [the] Committee to Establish Special Disaster Payment Criteria" issued by the Department of Agriculture in response to the GAO report. As with the GAO report to which it responds, the cited report does not purport to bind the Secretary's hand in determining whether to invoke his discretionary authority under Section 1444d(b)(2)(D) in the first instance, but simply proposes uniform criteria (as recommended by the GAO) for administering the program once it has been activated in a given emergency.

6. Respondents' remaining arguments are insubstantial.

a. They contend (Br. in Opp. 22-23) that the anti-injunction statute, 15 U.S.C. 714b(c), does not apply because this is a suit against the Secretary under the Administrative Procedure Act, and not against the Commodity Credit Corporation (CCC) or its property.[6] As Judge Fagg recognized (Pet. App. 22a-23a), that contention draws a distinction without a difference. Respondents have demanded *implementation* of a *program* for *payment of benefits* administered by the CCC out of CCC funds. Thus, the ultimate relief sought in this case amounts to an injunction against the CCC and its property, in direct contravention of

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[6]Respondents tellingly assert (Br. in Opp. 22-23 (emphasis added)) that their quarrel is with the Secretary "for failing to carry out his statutory *mandate* under 7 U.S.C. § 1444d(b)(2)(D)." Of course, Section 1444d(b)(2)(D) creates no mandate; by its terms it is simply a delegation of authority to agency discretion.

the express prohibition of 15 U.S.C. 714b(c). It is appropriate for this Court to grant review in order to rectify the Eighth Circuit's mistaken exercise of remedial authority. See *Lyng* v. *Payne,* No. 84-1948 (June 17, 1986).

b. Respondents argue (Br. in Opp. 23-24) that the relief they demand (implementation of the discretionary SDPP) would pose no danger to the success of the congressionally-preferred crop insurance program.[7] They assert that "[t]he holding [below] simply requires that benefits be available where federal crop insurance [does not cover the loss]," and point out (*id.* at 24) that "[i]f the Secretary were able to implement a program of crop insurance that provided adequate coverage for producers and smooth out transitional problems, no payments would be made under the SDPP." This tautology is irrelevant, because the statute prohibits SDPP payments where crop insurance is adequate. At all events, when Congress enacted the discretionary SDPP it was concerned that the availability of cash payments would detract from the successful implementation of the crop insurance program. S. Rep. 97-126, *supra,* at 75-76. In order to prevent that result, Congress chose to *permit* the Secretary, in his discretion, to provide cash SDPP payments under very limited conditions where he finds, inter alia, that crop insurance was "insufficient" for a particular disaster situation. Obviously, if cash payments are automatically available whenever crop insurance is "insufficient," there would be no occasion for an exercise of discretion, and Congress's provision that the Secretary "may" provide such payments in certain situations is converted to a directive that he "must" provide payments whenever the conditions pertain. Apart from draining all meaning from the

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[7]Respondents also contend (Br. in Opp. 23-24) that the Secretary's cost estimate for compulsory implementation is "grossly inaccurate," but they suggest no alternative estimate or basis for such an alternative.

plain language of Section 1444d(b)(2)(D), respondents' argument is circular and would effectively prevent the Secretary from successfully implementing the crop insurance program: producers would be discouraged from purchasing crop insurance if they knew that SDPP benefits could be obtained automatically and without cost to compensate for their inadequate insurance coverage.

c. Finally, respondents incorrectly accuse the Secretary (Br. in Opp. 24-26) of trying to abolish the discretionary SDPP by administrative fiat.[8] To the contrary, it was Congress that discontinued cash disaster assistance in order to encourage greater reliance on federal crop insurance. As respondents state, the administration bill for the 1981 Act proposed elimination of the previous system of disaster payments. See S. Rep. 97-126, *supra,* at 28-29. That proposal was adopted in the final enactment. 7 U.S.C. 1444d(b)(2)(C). All the major bills considered prior to enactment focused on reducing the federal involvement in the agriculture industry and substituting market factors as the prevailing norm. S. Rep. 97-126, *supra,* at 25-28. The limited, discretionary SDPP originated as a "*new* discretionary disaster payment program" (*id.* at 27 (emphasis added) (description of the bill proposed by Senator Huddleston)) and a departure from the general trend, undertaken with great caution to avoid undermining the success of crop insurance. *Id.* at 75-76. By opposing the conversion of a clearly discretionary program into a mandatory one, the Secretary is therefore simply endeavoring to carry out the statute as envisioned by Congress.

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[8]Indeed, as we have explained (Pet. 3-4 n.3), the Secretary did provide considerable assistance to Iowa farmers under several other federal programs and Iowa farmers received substantial indemnities under the federal crop insurance program.

For the reasons stated above and in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

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